

Hearing Date: December 6, 2011 at 10:00 a.m. (Eastern Time)
Objection Deadline: November 10, 2011 at 4:00 p.m. (Eastern Time)

BAKER & MCKENZIE LLP
1114 Avenue of the Americas
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Ira A. Reid (IR-0113)

Attorneys for Tokyo Gas Co. Ltd.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

<i>In re</i>)	
)	Chapter 11
)	
LEHMAN BROTHERS HOLDINGS INC., et al.,)	Case No. 08-13555 (JMP)
)	
)	(Jointly Administered)
Debtors.)	
)	
)	

OBJECTION OF TOKYO GAS CO. LTD. TO DEBTOR’
PROPOSED ASSUMPTION OF PURPORTED EXECUTORY
CONTRACTS ON EXHIBIT 2 OF THE PLAN SUPPLEMENT

Tokyo Gas Co. Ltd. (“TG”), by its counsel, Baker & McKenzie LLP, respectfully submits this objection to the proposed assumption by Lehman Brothers Commodity Services Inc. and its affiliated chapter 11 debtors (the “Debtors”) of purported executory contracts with TG and states as follows.

Background

1. Prior to these chapter 11 cases, TG was party to two existing derivative transactions with Lehman Brothers Commodity Services Inc. (“LBCSI”). One transaction was governed by a confirmation, dated June 9, 2008, under an ISDA Master

Agreement dated as of August 6, 2007 (the “Master Agreement”). The second transaction was governed by an independent confirmation, dated May 20, 2008, that was not included under the Master Agreement, but was to be covered by a separate ISDA Master Agreement which was never executed (the “May Confirmation” and, collectively with the Master Agreement, the “Agreements”).

2. By an early termination notice dated September 22, 2008, a copy of which is attached as Exhibit “A,” TG gave notice of the occurrence of an Event of Default under the May Confirmation with respect to LBCSI, designating September 22, 2008 as the Early Termination Date with respect to the May Confirmation. The Master Agreement, unlike the May Transaction, was governed by an Automatic Early Termination Date provision triggered by the Lehman Brothers Holdings Inc. chapter 11 filings on September 15, 2008. TG nevertheless sent a confirmatory early termination notice dated September 22, 2008 to LBCSI concerning the occurrence of an Event of Default under the Master Agreement, a copy of which is attached as Exhibit “B”, designating September 15, 2008 as the Early Termination Date in accordance with the Automatic Early Termination provisions under the Master Agreement.

3. By notices each dated September 29, 2008, TG gave notice of net termination payment amounts due from TG to LBCSI, including a calculation of the net termination amounts, which TG paid to LBCSI.

4. On October 3, 2008, LBCSI filed its chapter 11 petition.

5. The Debtors filed their Third Amended Chapter 11 Plan. On October 25, 2011, they filed their Plan Supplement (the “Plan Supplement”), including, on Exhibit 2, Part A thereto, a list of purportedly executory derivative contracts that the

Debtors seek to assume under the Plan (the “Assumption Schedule”). The Assumption Schedule includes all Derivative Contracts (as defined therein) between TG and LBCSI. TG has not received a notice of proposed assumption of executory contracts and unexpired leases from the Debtors and is unaware as to whether the Debtors have attempted to effectuate service.

Argument

6. The Debtors fail to state which purportedly executory contracts they intend to assume on the Assumption Schedule. According to the preamble to the Assumption Schedule, if no particular contract is named, it means the Debtors intend to assume all executory contracts with the counterparty. TG, however, has no executory contracts existing with either LBCSI or any other Debtors. In order to provide adequate notice and a meaningful opportunity to respond, the Debtors should explicitly reference the particular contracts they intend to assume. The purported notice given in the Assumption Schedule is thus inadequate. *See In re Ford*, 159 B.R. 930, 932 & nn.8-9 (Bankr. W.D. Wash. 1993).

7. All transactions between TG and LBCSI, including the Agreements, were properly terminated prior to the LBCSI petition date. In the more than three years since they were terminated, LBCSI has never once challenged the effectiveness of the TG termination notices. Indeed, TG has made substantial payments to LBCSI on account of the terminated Agreements. Even if it were possible to assume terminated contracts, the cure amounts would need to include at least repayment of the termination amounts paid by TG, plus interest, plus the costs associated with re-hedging the transactions.

8. When a contract is terminated, it is no longer executory and is incapable of being assumed or assigned under section 365 of the Bankruptcy Code. Under the Countryman definition of executory contract, which has been adopted by the Second Circuit, “an executory contract is one ‘under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.’” *See In re Penn Traffic Co.*, 524 F.3d 373, 379-80 (2d Cir. 2008); *see also In re Orla Enterprises*, 399 B.R. 25, 29 (Bankr. N.D. Ill. 2009)(“The focus of whether a contract is executory is determined by looking at the obligations as they existed at the date of the filing of the bankruptcy petition”). In light of the fact that the Agreements were terminated pre-petition, they are no longer executory and they are not subject to assumption or assignment under section 365 of the Bankruptcy Code.

9. TG reserves all of its rights, claims, counterclaims, and defenses in connection with the Agreements and matters addressed herein.

WHEREFORE, TG respectfully requests that this Court direct removal of TG from the Assumption Schedule and grant such other and further relief as is just and proper.

Dated: November 10, 2011
New York, New York

BAKER & McKENZIE LLP

By: /s/Ira A. Reid
Ira A. Reid (IR-0113)
1114 Avenue of the Americas
New York, NY 10036
Telephone: (212) 891-3796

Attorneys for Tokyo Gas Co. Ltd.

EXHIBIT A



BY HAND

Lehman Brothers Commodity Services Inc.
c/o Lehman Brothers Inc.
Corporate Advisory Division
Transaction Management Group
745 Seventh Avenue
New York, NY 10019

Attention: Documentation Manager

September 22, 2008

NOTICE OF EARLY TERMINATION

Dear Sirs:

We refer to the ISDA Master Agreement (Multicurrency-Cross Border) referred to under the Confirmation dated as of May 20, 2008 by and between Lehman Brothers Commodity Services Inc. and Tokyo Gas Co., Ltd. (the "Agreement"). All capitalized terms used and not otherwise defined herein shall have the meanings assigned to them in the Agreement.

We hereby give notice that, as a result of the filing of a Voluntary Petition under Chapter 11 of the U.S. Bankruptcy Code on September 15, 2008, by Lehman Brothers Holdings Inc., an Event of Default has occurred under Section 5(a) (v) and (vii) of the Agreement and this Event of Default is still continuing.

Pursuant to Section 6(a) of the Agreement, we hereby designate September 22, 2008 as the Early Termination Date in respect of all outstanding Transactions.

On or as soon as reasonably practicable following the Early Termination Date, we will provide you with a statement in accordance with Section 6(d)(i) of the Agreement specifying the amount payable under Section 6(e) of the Agreement.

We will pay such amount (if any) to the following account:

Lehman Brothers Commodity Services Inc.
Institution: Citibank, Tokyo
SWIFT: CITIJPJT
Account No. 159925404
Reference: /bnf/energy

In accordance with Section 12(a) of the Agreement, this notice is being delivered by us during normal business hours and will be deemed effective on September 22, 2008.

We reserve all rights and remedies as provided in the Agreement or otherwise.



Yours faithfully,

Tokyo Gas Co., Ltd.

By: 中島 功
Name: Isao Nakajima
Title: General Manager

Acknowledged the receipt of the foregoing notice on
September 22, 2008.

On behalf of Lehman Brothers Commodity Services Inc.

By: Kiray Acosta
Name: Kiray Acosta
Title (Company): Admin. Asst.

EXHIBIT B

NYCDMS/1202075.1



TOKYO GAS

TOKYO GAS CO., LTD.

BY HAND

Lehman Brothers Commodity Services Inc.
c/o Lehman Brothers Inc.
Corporate Advisory Division
Transaction Management Group
745 Seventh Avenue
New York, NY 10019

Attention: Documentation Manager

September 22, 2008

NOTICE OF EARLY TERMINATION

Dear Sirs:

We refer to the ISDA Master Agreement dated as of August 6, 2007 by and between Lehman Brothers Commodity Services Inc. and Tokyo Gas Co., Ltd. (the "Agreement"). All capitalized terms used and not otherwise defined herein shall have the meanings assigned to them in the Agreement.

We hereby give notice, for confirmatory purpose, that, as a result of the filing of a Voluntary Petition under Chapter 11 of the U.S. Bankruptcy Code on September 15, 2008, by Lehman Brothers Holdings Inc., an Event of Default has occurred under Section 5(a) (vii) of the Agreement and the Early Termination Date in respect of all outstanding Transaction(s) (including but not limited to the Transaction under the Confirmation dated as of June 9, 2008 by and between Lehman Brothers Commodity Services Inc. and Tokyo Gas Co., Ltd.) will be deemed to have occurred as of the time immediately preceding the institution of the filing of the Voluntary Petition by Lehman Brothers Holdings Inc. KA

We hereby request you to confirm that September 15, 2008 is designated as the Early Termination Date in respect of all outstanding Transaction(s).

As soon as reasonably practicable hereafter, we will provide you with a statement in accordance with Section 6(d)(i) of the Agreement specifying the amount payable under Section 6(c) of the Agreement.

We will pay such amount (if any) to the following account:

Lehman Brothers Commodity Services Inc.
Institution: Citibank, Tokyo
SWIFT: CITIJPJT
Account No. 159925404
Reference: /bnf/energy



In accordance with Section 12(a) of the Agreement, this notice is being delivered by us during normal business hours and will be deemed effective on September 22, 2008.
We reserve all rights and remedies as provided in the Agreement or otherwise.

Yours faithfully,

Tokyo Gas Co., Ltd.

By: 中島 功
Name: Isoo Nakazima
Title: General Manager

Acknowledged the receipt of the foregoing notice and confirmed as requested above on September 22, 2008.

On behalf of Lehman Brothers Commodity Services Inc.

By: Kiray Acosta
Name: Kiray Acosta
Title (Company): Admin. Asst.